

Writer's Direct Dial
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April 25, 2005

EX PARTE

Ms. Marlene Dortch
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation: WC Docket No. 04-29.

Dear Ms. Dortch:

On Friday, April 22, 2005 Dave Baker, Vice President of Law and Public Policy for EarthLink, and Earl Comstock and John Butler of Sher & Blackwell LLP met separately with Chairman Kevin Martin and with Commissioner Copps and Jessica Rosenworcel, Commissioner Copps' legal advisor, to urge denial of SBC's petition for forbearance for IP Platform Services. In each of the meetings the attached summary of talking point was provided and the points made therein were discussed.

If you have any questions regarding this notice, please contact the undersigned at 202-463-2514.

Sincerely,

/s/ Earl W. Comstock

Earl W. Comstock
Counsel for EarthLink, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

WC Docket No. 04-29

Presentation of EarthLink, Inc.
Regarding Petition of SBC Communications Inc. for Forbearance from the Application of Title II
Common Carrier Regulation to IP Platform Services

April 18, 2005

- The petition should be denied because it fails to provide information necessary for the Commission to accurately identify: (1) the specific services for which relief is sought, (2) the specific statutory and regulatory provisions at issue, (3) the carriers to which such relief would apply, or (4) the geographic markets to which such relief would apply. The petition should be denied because there is no analysis, as required by the statute, of the impact that forbearance from each applicable provision of title II and the Commission's regulations would have on just and reasonable rates, consumers, or the public interest. The Commission has said that it "cannot forbear in the absence of a record that will permit [the Commission] to determine that each of the tests set forth in Section 10 is satisfied for a specific statutory or regulatory provision." *In re Forbearance From Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, 15 F.C.C.R. 17,414, ¶ 13 (2000). There is no such record here.
- The petition should be denied because it improperly relies entirely on the assertion that there is sufficient competition to justify forbearance from all applicable provisions of title II of the Communications Act and the Commission's regulations. The Commission has clearly stated in considering previous forbearance requests that "petitioners must support such requests with more than broad, unsupported allegations in order for [the Commission] to exercise that statutory authority." *In re Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, 12 F.C.C.R. 8596, ¶ 21 (1997). In fact, the Commission itself has found with respect to the broadband Internet access market that the Hirfindahl-Hirschman Index ("HHI") is between 5,200 and 10,000, a highly-concentrated market—not a competitive one—by any measure. *In re Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 Mhz Bands*, 18 F.C.C.R. 6722, ¶ 124 (2003).
- The petition should be denied because the petitioners themselves assert in a contemporaneously filed petition for declaratory ruling that the services for which forbearance is sought are not telecommunications services, which the services must be in order for section 10 of the Communications Act even to apply. Similarly, the Commission presently has pending at least two open dockets in which the definitional status of the services for which the petition seeks forbearance is under consideration but has not yet been resolved. *See, e.g.*, Docket 02-33 (Wireline Broadband) and Docket 04-36 (IP-Enabled). Until and unless there is an analysis of these services as telecommunications services, there can be no forbearance.

- The petition should be denied because it falls short of the extraordinary showing required for forbearance from sections 201 and 202. The Commission has held that, although section 10 gives the Commission authority to forbear from enforcing sections 201 and 202, such a decision would be a “particularly momentous step.” *In re PCIA’s Petition for Forbearance for Broadband Personal Communications Services*, 13 F.C.C.R. 16,857, ¶ 15 (1998). The Commission has held in the past with respect to forbearance proceedings in the much more competitive wireless market that “the benefits sections 201 and 202 confer upon the public by protecting consumers and preventing unjust, unreasonable, and discriminatory practices are important parts of our public interest analysis” and refused to waive those sections. *Id.* at ¶ 28.
- Finally, the petition’s request for forbearance from *Computer II* unbundling requirements should also be denied. These unbundling requirements simply implement the requirements of sections 201 and 202 with respect to the provision of transmission facilities used to provide information services, and therefore forbearance from *Computer II* unbundling is forbearance from sections 201 and 202.